Supreme Court, U.S.
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No. 10-621

In The

Supreme Court of the United States

KEITH C. BROOKS,

Petitioner,

v.

STEVE GAENZLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court reverse the holding in *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), that for a Fourth Amendment seizure to occur, there must be "governmental termination of freedom of movement through means intentionally applied?" (emphasis deleted).

PARTIES TO THE PROCEEDING

Keith Clayton Brooks was the Plaintiff in the district court action and Petitioner below and is Petitioner in this Court. Steve Gaenzle, Paul Smith, Terry Maketa, the El Paso County Sheriff's Office, and El Paso County, Colorado were Defendants in the district court action. Steve Gaenzle and Paul Smith were Respondents in the Tenth Circuit Court of Appeals. Steve Gaenzle is the only Respondent in this Court.

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The decision of the United States Court of Appeals for the Tenth Circuit is published as *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010) and is included as Petitioner Appendix ("Pet. App.") pages 1-40. The memorandum opinion of the United States District Court for the District of Colorado is unreported but is available as *Brooks v. Gaenzle*, No. 06-1436, slip. op., 2009 WL 3158138 (D. Colo. Sept. 29, 2009) and is included, in part, as Pet. App. pages 41-53.

STATEMENT OF JURISDICTION

The opinion of the Tenth Circuit Court of Appeals was entered on August 10, 2010. By order entered August 26, 2010, the Court of Appeals extended the time for filing a petition for rehearing until September 13, 2010. By order of September 17, 2010, the Court of Appeals extended the time for filing a petition for rehearing until September 20, 2010. Petitioner did not file a petition for rehearing but instead filed his petition for writ of certiorari on November 8, 2010, and invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, "[t]he right of

the people to be secure in their persons . . . against unreasonable searches and seizures . . . ."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This matter arises out of an October 17, 2005, incident in which Petitioner, Keith Clayton Brooks, Jr. ("Brooks"), was shot in the buttocks while fleeing from the scene of a burglary and attempted murder of two El Paso County, Colorado, Sheriff's Office ("EPSO") deputies. Brooks brought federal claims for relief including excessive force in violation of the Fourth Amendment, conspiracy, and malicious prosecution, and state tort claims of assault and battery against the two EPSO deputies, Steve Gaenzle ("Gaenzle") and Paul Smith ("Smith"), in both their individual and official capacities as well as claims against Terry Maketa, Sheriff of El Paso County, Colorado, the El Paso County Sheriff's Department, and El Paso County, Colorado.

By stipulation, the El Paso County Sheriff's Department, El Paso County Sheriff Terry Maketa, and the El Paso County Board of County Commissioners were dismissed.

On April 30, 2008, following extensive discovery, Gaenzle and Smith filed their motion for summary judgment. On February 19, 2009, Magistrate Judge Michael J. Watanabe, pursuant to an order of reference by the district court, submitted his recommendation on the deputies' motion for summary

judgment. *See Brooks v. Gaenzle*, No. 06-1436, slip. op., 2009 WL 3158138, at *13-26 (D. Colo. Sept. 29, 2009) (recommendation attached to the decision of the district court). Therein, Magistrate Judge Watanabe recommended that the motion be granted as to each of Brooks' claims for relief.

Following Brooks' objection to Magistrate Judge Watanabe's recommendation, and after additional briefing, District Court Judge Christine Arguello, on September 29, 2009, issued her decision adopting the recommendation and affirming summary judgment. *See id.*

Brooks appealed the order of summary judgment of Judge Arguello to the United States Court of Appeals for the Tenth Circuit. On August 10, 2010, Circuit Judges Wade Brorby, Terrence O'Brien, and Neil Gorsuch affirmed the district court's grant of summary judgment as to Brooks' federal actions for excessive force, conspiracy, and malicious prosecution, though reversed the district court's grant of summary judgment on the state law claims of assault and battery, remanding those claims to the district court with instructions to dismiss them without prejudice based on the absence of pendent jurisdiction.

Brooks seeks certiorari as to only the federal action for Fourth Amendment excessive force against Deputy Gaenzle.

II. FACTS RELEVANT TO THE PETITION

The Tenth Circuit, in its description of the factual background of the case, relied upon "the parties' statement of undisputed facts, as amended by Brooks, in his response to the Deputies' motion for summary judgment." *Brooks v. Gaenzle*, 614 F.3d 1213, 1215 n.3 (10th Cir. 2010). The facts material to the Circuit's affirmation of summary judgment are adequately set out in the Circuit's opinion under Section 1, Factual Background. *Id.* at 1215-16. While, in most respects, Brooks' petition adequately tracks the undisputed facts, there are a few important exceptions and omissions. Respondent therefore restates the facts herein.

On October 17, 2005, during daylight hours, Brooks and his accomplice, Nicholas Acevedo ("Acevedo"), forcibly entered a residence located at 950 Lindstrom Drive, El Paso County, Colorado, through a door to a garage located on the east side of the residence with the intent to burglarize the home. Brooks and Acevedo's entry into the garage was witnessed by a neighbor who advised the authorities. *Brooks*, 614 F.3d at 1215; Pet. App. 3.

Deputies Gaenzle and Smith were dispatched to the scene of the burglary. Upon approaching the door to the garage, Gaenzle believed he could hear two or three people talking. Gaenzle and Smith entered the garage, announcing, "Sheriff's Office." *Id.*

Upon entering the garage, Gaenzle and Smith observed a kneeling, male suspect stand up, turn, run

into the main part of the house, and close a door that separated the garage from the main part of the house. While the door was being barricaded by an unknown suspect's body within the house, Gaenzle attempted to enter the door, announcing at the same time, "Sheriff's Office." *Id.*

While attempting to open the door, a gunshot pierced through the door very close to the deputies' heads. Shrapnel from the door struck both Gaenzle and Smith. Neither Gaenzle nor Smith saw who fired the shot through the door, what caliber gun was used, or if there were any other weapons. *Id.*

Within moments of being shot at through the door, Gaenzle and Smith exited the side garage door, checked to see whether they had received any injuries from the gunshot, and then immediately observed a male, later determined to be Brooks, fleeing toward an approximately six foot tall wooden backyard fence. *Brooks*, 2009 WL 3158138 at *14. Brooks was attempting to flee from the scene of the burglary and the attempted murder of the deputies. Gaenzle and Smith both state that Gaenzle ordered the male to stop. An independent witness heard the deputies advise Brooks to stop, but Brooks did not stop. *Brooks*, 614 F.3d at 1215; Pet. App. 4.

Gaenzle fired one shot at the fleeing Brooks, striking Brooks in the buttocks. Despite being shot, Brooks jumped over the six foot fence and continued to flee and escaped the scene with Acevedo. *Id.* No evidence was presented in response to the Motion for Summary

Judgment that indicated that the shot stopped or substantially encumbered or slowed Brooks' escape. *See Brooks*, 2009 WL 3158138 at *1; Pet. App. 43; *Brooks*, 614 F.3d at 1224; Pet. App. 24. Gaenzle and Smith did not pursue Brooks as they had not observed any other party exit the house and intended to remain to secure the perimeter of the house.

Three days later, on October 20, 2005, Brooks was located in the vicinity of the Citadel Mall, a major shopping mall in Colorado Springs, by Colorado Springs Police Department officers and EPSO deputies and was subsequently arrested in a nearby residential garage after Brooks fled from outside the Citadel Mall. *Brooks*, 614 F.3d at 1215; Pet. App. 4. A rifle was part of the evidence collected from the vehicle that Brooks used in his attempt to flee his capture outside the Citadel Mall.

Substantial evidence, independent of the statements of Gaenzle and Smith, was developed in the investigation of Brooks that Brooks did posses a weapon at the time of the burglary and/or that he shot at the deputies at the time of the burglary. *Brooks*, 614 F.3d at 1225 n.10; Pet. App. 28-29.

Brooks went to trial on the following charges: (1) criminal attempt to commit murder in the first degree, after deliberation, of a police officer; (2) criminal attempt to commit murder in the second degree; (3) assault in the first degree; (4) first degree

burglary – assault or menace; (5) first degree burglary – deadly weapon; and (6) menacing. Additionally, as to most of these charges, Brooks was charged with a sentencing enhancement under C.R.S. § 18-1.3-406 on the basis that Brooks used or possessed a deadly weapon during the commission of the charged crimes. *Brooks*, 614 F.3d at 1216; Pet. App. 5.

Brooks was subsequently convicted of all of the above-referenced charges. The jury did not find in favor of the sentencing enhancement under C.R.S. § 18-1.3-406. On the basis of these and prior convictions, Brooks was sentenced as a habitual criminal under C.R.S. § 18-1.3-801 to 148 years in prison. *Id.*

III. THE DISTRICT COURT AND TENTH CIRCUIT OPINIONS

The district court granted summary judgment on behalf of Gaenzle and Smith on the Fourth Amendment excessive force claim on three alternative grounds: (1) that Brooks was not seized by the deputies within the meaning of the Fourth Amendment; (2) that the force used by the deputies was objectively reasonable under the circumstances; and (3) that the deputies were entitled to qualified immunity as their conduct did not violate a clearly-established Constitutional right of Brooks.

As to the seizure issue, the district court noted that there was "no bright line test for determining whether a seizure occurs under the Fourth Amendment" but, citing *Brower v. County of Inyo*, 489 U.S.

593, 595-96 (1989), stated that "a seizure can only occur if the government's actions somehow restrain the movement of the suspect." *Brooks*, 2009 WL 3158138 at *3. The district court observed that while the gunshot which struck Brooks "presumably [caused] Plaintiff pain or slowed the pace of his escape [it] did not bring Plaintiff within the government's possession or control. [cite omitted] Indeed, Plaintiff still had enough spring in his step to evade police in the mall parking lot days later." *Id.* at *6.

Brooks did not, to the district court, argue that pain or slowed movement was sufficient to constitute a seizure.

In affirming the district court's determination that a seizure had not occurred, the Tenth Circuit observed that Brooks' seizure argument "relie[d] on the same or similar arguments he made in opposing the deputies' motion for summary judgment" – that:

> . . . intentional physical deadly force to restrain a suspect's movement is sufficient per se to constitute a seizure, regardless of whether his movement was "substantially precluded" or "seriously encumbered." In making this argument, Mr. Brooks asserts *Hodari* stands for the proposition the "'application of physical force to restrain movement, even when it is ultimately unsuccessful,' is a seizure." He contends such seizure was accomplished when he was struck by the bullet. He concludes that because Deputy Gaenzle applied physical deadly

> force with the intent of restraining his movement, a seizure occurred, regardless of whether his "attempted apprehension was 'ultimately unsuccessful'" or he still had "spring in his step" days later at the time of his arrest. He alternatively contends his "'pain[ed] or slowed' movement," as referenced by the district court, sufficiently constitutes a seizure, as it restrained his movement.

Brooks, 614 F.3d at 1218 (internal citations omitted).

The Tenth Circuit considered, in part, in its seizure analysis the cases of *Terry v. Ohio*,[1] *United States v. Mendenhall*,[2] and *Tennessee v. Garner*,[3] and concluded that:

> Thus, from *Terry*, *Mendenhall*, and *Garner*, one can reasonably conclude a "seizure" requires restraint of one's freedom of movement and includes apprehension or capture by deadly force. However, they do not stand for the proposition, as Mr. Brooks contends, that use of deadly force alone constitutes a seizure. Instead, it is clear restraint of freedom of movement must occur.

Id. at 1219.

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[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] *United States v. Mendenhall*, 446 U.S. 544 (1980).

[3] *Tennessee v. Garner*, 471 U.S. 1 (1985).

The Circuit went on to consider subsequent cases, including *Brower*, noting that "a seizure occurs if the person is 'stopped by the very instrumentality set in motion or put in place' to achieve that result." *Id.* at 1220 (quoting *Brower*, 489 U.S. at 599). The Circuit further noted that *Brower* held that a "'[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control.'" *Brooks*, 614 F.3d at 1220 (quoting *Brower*, 489 U.S. at 596). Applying these seizure principles to *Brooks*, the Circuit noted that:

> . . . the gunfire which struck Mr. Brooks was intentional and intended to stop him, but he was not "stopped by the very instrumentality set in motion" for that purpose and, instead, he continued to flee and elude authorities for days. Under the circumstances, we cannot say authorities gained "intentional acquisition of physical control" over Mr. Brooks.

Brooks, 614 F.3d at 1220 (quoting *Brower*, 489 U.S. at 596).

The Tenth Circuit rejected Brooks' argument that *California v. Hodari D.*, 499 U.S. 621 (1991), modified the seizure analysis of *Brower*, noting that Brooks improperly relied on common law *dicta* in *Hodari*. As to that analysis, the Circuit wrote:

> [I]n relying on the *Hodari* common law dicta, Mr. Brooks and these cases ignore the Hodari Court's further explanation:

> We have consulted the common-law to explain the meaning of seizure. . . . [and] neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.

Brooks, 614 F.3d at 1221 (quoting *Hodari*, 499 U.S. at 626 n.2) (emphasis in original).

The Circuit reasoned that the discussion in *Hodari* of the common-law rule was merely an illustration of the principle that "'attempted seizures'" are beyond the Fourth Amendment scope. The Circuit further noted that "when read in context in its entirety, *Hodari* clarifies that a seizure cannot occur unless a show of authority results in the suspect's submission." *Brooks*, 614 F.3d at 1221.

The Circuit declined to address Brooks' argument that pained or slowed movement was sufficient to constitute a seizure, as such argument was made for the first time on appeal and not raised before the district court and was otherwise not supported by citation or legal authority. *Id.* at 1225. As the Circuit affirmed the excessive force claim on the basis of its seizure analysis, it did not reach the district court's alternative bases for dismissal of objective reasonableness of the force used and qualified immunity.

ARGUMENT

CERTIORARI IS NOT WARRANTED AS *BROWER v. COUNTY OF INYO* SUFFICIENTLY SETS OUT THE PROPER FOURTH AMENDMENT SEIZURE STANDARD.

I. THE TENTH CIRCUIT'S OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Fourth Amendment provides protection against "unreasonable searches and seizures."[4] To state a claim for excessive force under the Fourth Amendment, a plaintiff must demonstrate: (1) that a "seizure" occurred and (2) that the force used in affecting the seizure was objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

This Court has held that for a Fourth Amendment seizure to occur, there must be "governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 597 (emphasis deleted); *see also Scott v. Harris*, 550 U.S. 372, 381 (2007) (citing the same language with approval).

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[4] Respondent agrees that seizure analysis under the Fourth Amendment is an important Constitutional issue but disagrees with Petitioner that the seizure analysis applied by the Tenth Circuit, here, has important Constitutional implications. As set out herein, the Tenth Circuit properly applied the long-standing seizure analysis articulated in *Brower*, and, additionally, the unique facts presented in this case make it unlikely that this Court's consideration of the seizure issue would assist lower courts in performing future Fourth Amendment seizure analysis.

The district court and the Circuit agreed that no seizure had occurred here as:

> . . . Defendant Gaenzle shot and struck Plaintiff, but Plaintiff managed to climb the fence and elude arrest for three days. Indeed, none of the evidence in the record reflects that Defendant Gaenzle's shot even temporarily halted Plaintiff in his escape. . . .

Brooks, 2009 WL 3158138 at * 5; *see also Brooks*, 614 F.3d at 1220.

Brooks argues that *Hodari* modified *Brower* to provide that intent to restrain accompanied by physical force, even if such force fails even momentarily to terminate freedom, is all that is necessary to constitute a Fourth Amendment seizure. Brooks then asserts that certiorari should be granted as the Circuit improperly considered the physical force seizure discussion in *Hodari* as *dicta* and therefore failed to apply it properly to the facts here. (Petition at 26-30). Even cursory review of *Brower* and *Hodari* demonstrates that the Circuit's decision withstands this criticism.

Brower directly considered the issue of seizure by physical force. There, this Court considered whether a plaintiff who crashed into a police roadblock was seized in violation of the Fourth Amendment. Focusing on the actual acquisition of physical control as a condition of seizure, this Court wrote that: "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower*, 489 U.S. at

596. Expanding on this need for acquisition of physical control, this Court went on to explain that a Fourth Amendment seizure occurred "only when there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 597 (emphasis deleted).

This Court further observed:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized *who has been stopped* by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. *We think it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.* It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock – *and that he was so stopped.*

Id. at 598-99 (emphasis added).

As noted in *Brower*, then, a seizure requires an actual termination of freedom. Indeed, there would appear to be little doubt that had the police in *Brower* attempted to terminate the chase with an

unsuccessful Precision Intervention Technique ("PIT") maneuver[5] or had Brower successfully run the roadblock and escaped for days, even if he sustained an injury in the process, a seizure would not have been found to have occurred. *See id.* at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, *producing the crash*, then the termination of the suspect's freedom of movement would have been a seizure.") (emphasis added).

In *Hodari*, this Court held that a police officer's unheeded orders to a fleeing suspect to halt were not a seizure until the suspect was tackled by the officer and, as such, drugs abandoned during the flight would not be suppressed on an argument of improper seizure. *Hodari*, 499 U.S. at 629. The *Hodari* finding, that a seizure did not occur upon ordering the suspect to halt, looked to early cases determining when, at common law, an arrest had occurred. The issue of whether there was a seizure was important to the issue in *Hodari* of whether evidence that was discarded by the plaintiff after the order to halt but before being physically controlled was a fruit of an unconstitutional seizure or was abandoned.[6] The common law that defined an arrest, cited by this

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[5] The PIT maneuver calls for a pursuing vehicle to make a controlled collision with the fleeing vehicle with the intent to cause the fleeing vehicle to spin and stop. *See Scott v. Harris*, 550 U.S. 372, 375 (2007).

[6] It was conceded in *Hodari* that the officer did not have the reasonable suspicion required to justify stopping Hodari.

Court and relied on now by Brooks, provided that an arrest occurred at the time that an officer laid a hand on the suspect even though laying of such hand may not have succeeded in stopping and holding the suspect.

The facts of *Hodari* did not involve an officer's touching the suspect in any way. Indeed, the *Hodari* Court's physical force seizure reference appears to have been done merely as a contrast to the question of whether *Hodari* was seized by mere show of authority. Thus, to the extent *Hodari* observed that a mere touching constituted an arrest, such holding was, as noted by the Circuit, an isolated comment and non-binding *dicta* as it was unnecessary to the result.[7] Brooks' attempt to argue that the Circuit improperly characterized the physical force seizure observation in *Hodari* as *dicta* is inconsistent with its obvious context of use and against the weight of other authority that has considered it. *See United States v. Dupree*, 617 F.3d 724, 730 n.5 (3rd Cir. 2010) (pointing out that the *Hodari* decision on this point was *dicta*); *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010) (same). It is also inconsistent with *Hodari*'s limitation of the scope of the opinion. *Hodari*, 499 U.S. at 626 ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield.").

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[7] *See Central Green Co. v. United States*, 531 U.S. 425, 431 (2001) (*dicta* may be followed if sufficiently persuasive but is not binding).

This Court has not subsequently decided a case applying the *Hodari* physical force seizure *dicta* to a seizure by mere use of physical force. Moreover, the *dicta* in *Hodari* does not purport to nor does it overrule the *Brower* holding that a seizure occurs only upon the actual termination of freedom. In contrast, this Court, since the *Hodari* decision, has cited with approval the seizure definition in *Brower*. *See Brendlin v. California*, 551 U.S. 249, 254 (2007); *Scott*, 550 U.S. at 384;[8] *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

Instructive on the issue of whether this Court intended in *Hodari* to modify the *Brower* termination of freedom requirement in seizure analysis is *Brendlin v. California*, 554 U.S. 249. There, this Court considered whether a traffic stop constituted a seizure for Fourth Amendment purposes. After citing with approval the *Brower* seizure analysis, this Court wrote:

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[8] This Court in *Scott* emphasized the "termination" of freedom aspect of the *Brower* seizure analysis as follows:

> The only question in *Brower* was whether a police roadblock constituted a seizure under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are "responsib[le] for the termination of [a person's] movement," [*Harris v. Coweta County*], 433 F.3d [807], at 816 [(11th Cir. 2005) (quoting *Brower*, 489 U.S. at 595)], regardless of the reason for the termination.

Scott, 550 U.S. at 584 n.10 (emphasis added).

> A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. *See California v. Hodari D.*, 499 U.S. 621, 626, n. 2, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) [remaining citations omitted].

Brendlin, 551 U.S. at 254. In citing *Hodari* as authority for the above passage, this Court expressed its opinion that *Hodari* did not modify but left in place the actual submission or "termination of freedom" requirement of *Brower* for Fourth Amendment seizure analysis.

Federal courts are in general agreement that a seizure does not occur where an officer attempts to shoot a fleeing suspect but misses and the suspect continues his escape. *See, e.g.*, *Bella v. Chamberlain*, 24 F.3d 1251, 1255-56 (10th Cir. 1994). Based on Brooks' definition of a seizure, then, in such cases had the bullet so much as grazed the successfully fleeing suspect, a seizure would have occurred, thus changing the outcome of those cases. While such analysis may be appropriate for tort concepts of battery, it is wholly inappropriate and unworkable for purposes of establishing a Fourth Amendment seizure. Indeed, there would appear to be no substantive difference, for purposes of Fourth Amendment seizure analysis, whether a bullet fails to strike its intended target or

strikes the target but inflicts a wound insufficient to bring the fleeing suspect under control.

The Circuit, observing the absurd result of a strict application of Brooks' seizure analysis, noted, as did Respondent in his argument below, that a seizure would not occur if an officer used a hand grenade in an attempt to stop a successfully fleeing suspect but the suspect was not physically touched. However, a seizure would be said to have occurred if the officer threw and hit the suspect with a snowball with the intent of stopping the same successfully fleeing suspect. *Brooks*, 614 F.3d at 1223 n.7. The simpler, more logical test to establish a Fourth Amendment seizure should remain that as set out by this Court in *Brower* – that there has been a termination of the freedom of the suspect.

II. THE CIRCUIT COURTS ARE NOT IN SUBSTANTIAL CONFLICT.

Brooks argues that decisions from the Third, Sixth, Seventh, Eighth, and Eleventh Circuits conflict with the Tenth Circuit's decision in *Brooks*. Review of the cases purported to establish such conflict demonstrates that the circuits are either not in conflict or have not squarely addressed the seizure issue in such a manner as to conclude that an irreconcilable conflict exists.

Unlike here, where Brooks has not demonstrated the termination of his freedom of movement or that he "terminated his flight, even momentarily" (*Brooks*,

614 F.3d at 1225 n.8), almost all of the cases purported by Brooks to establish an inter-circuit conflict involve facts where the freedom of the subject of the argued seizure was, at least for some period of time, terminated. For example, in *United States v. Brown*, 448 F.3d 239 (3rd Cir. 2006), the court considered whether the defendant was seized when, in response to a *Terry* stop and command to put his hands on a police vehicle, the defendant initially complied but shortly thereafter tried to escape after an attempted pat-down. Similarly, in *United States v. Dupree*, 617 F.3d at 739, the prosecution conceded on appeal that a seizure occurred where a law enforcement officer grabbed the defendant's arm while the defendant was riding on a bicycle, stopping the bicycle and holding the defendant for approximately two seconds before he broke free in an escape attempt. *See also Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006) (plaintiff, shot in the face with a beanbag by police in an attempt to quell a riot, fell to the ground as a result of the shot and remained on the ground under orders of the police until he was later ordered to report to other officers at the end of the street); *Sargent v. City of Toledo Police Dept.*, 150 Fed. Appx. 470 (6th Cir. 2006) (not selected for publication) (suspect ran from officers during an attempt to question him regarding a noise complaint and was shot and killed when he retrieved a gun from under a mattress); *Fisher v. Memphis*, 234 F.3d 312 (6th Cir. 2001) (seizure occurred when a police officer jumped onto the hood of a moving vehicle and shot a passenger); *Acevedo v. Canterbury*, 457 F.3d 721 (7th Cir. 2006) (plaintiff

was knocked to the ground by an officer and momentarily lost consciousness); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) (vehicle chase in which seizure was not found to have occurred until the vehicle had actually been stopped); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995) (deceased was struck by a police vehicle and was shortly thereafter shot and killed by police); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003) (plaintiff was shot during a confrontation with police and, though able to run into his house, fell to the floor due to the injury and was shortly thereafter removed from the house by police and emergency medical providers); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (passenger in a fleeing vehicle shot by a sheriff's deputy was immediately paralyzed from the chest down and the chase continued only because the driver continued to evade law enforcement for a short period of time after the shooting); *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005) (in police effort to prevent a suicide attempt, plaintiff was hit in head with a rubber projectile, receiving significant brain injury and was effectively in custody both before and after the deployment of the projectile).

Respondent concedes that the facts in some of these cases are ambiguous or insufficiently detailed on the issue of whether the suspect's freedom of movement was terminated for at least some period of time. In *Fisher*, 234 F.3d 312, there is no reference in the opinion as to whether the vehicle stopped after the police officer jumped on the hood of the vehicle and shot the passenger. In *Ludwig*, 54 F.3d 465, the

Eighth Circuit described a seizure, occurring shortly before the deceased was shot and killed, when he was intentionally struck by a police vehicle. The facts surrounding the effect of the deceased's being hit by the vehicle, or even if he was hit by the vehicle, are unclear. The Eighth Circuit describes that: "[a]fter [the] failed attempt to hit Ludwig, the officers formed a semicircle around Ludwig" where Ludwig then engaged in conversation with the officers before he again fled and was shot and killed. *Ludwig*, 54 F.3d at 468-69. The absence of clear factual references that bear on the seizure issue in these cases is insufficient to establish a substantial conflict amongst the circuits.

Examination of these cases that purport to establish inter-circuit conflict also reveals that none directly considers the seizure issue addressed by the district court and the Tenth Circuit here. So too, examination of the subsequent history of the district court and Tenth Circuit decisions here reveals that, as of the time of filing this brief in opposition, no other court has cited, either favorably or unfavorably, either decision.

CONCLUSION

Brower v. County of Inyo provides an appropriate framework for proper Fourth Amendment seizure analysis. The Tenth Circuit's decision, here, is consistent with *Brower*, and the circuits are not in substantial conflict on its application. Moreover, the

unique facts presented in this case make it unlikely that this Court's consideration of the seizure issue would assist lower courts in performing future seizure analysis.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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